

Federal Regulations Proposed To Streamline Renewable Energy Projects On Tribal Land

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On February 15, 2011, the Department of the Interior, Bureau of Indian Affairs (BIA), proposed draft permitting and leasing regulations for wind and solar resources (WSR) intended to streamline federal approval for renewable energy development on tribal land.¹

For business, tax and legal reasons, most tribal renewable energy projects involve a tribe leasing land to a private company for the renewable energy development—and, as a matter of federal law, such leases must be reviewed and approved by the Department of Interior (DOI). The draft regulations would provide the first established procedures for obtaining federal approval specifically for WSR leases and permits. This is significant because there is a vast potential for renewable energy development on tribal lands but, despite considerable tribal interest, very few such projects have been developed so far. If and when finalized, the WSR regulations should help spur renewable energy development by streamlining the federal approval process for such projects on tribal land.

Unrealized Potential for Renewable Energy Development

Tribal lands have many inherent advantages for renewable energy development. Significantly, large swaths of land—more than 55 million acres in the lower 48 states²—are owned by the federal government in trust for Native American tribes. Though it represents only 5% of the land area of the United States, Indian country contains 10% of all renewable energy resources. The National Renewable Energy Laboratory (NREL) estimates that there is the potential for approximately 535 billion kWh/year of wind energy alone on tribal land, equivalent to 14% of the United States' current annual energy generation.³ For solar resources, NREL estimates that tribal land has 17,600 kWh/year of solar energy potential in the lower 48 states, which is 4.5 times the current U.S. annual energy generation.

¹ Preliminary Draft of Part 162, U.S. DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS (proposed February 15, 2011) (to be codified at 25 C.F.R. 162), available at <http://www.bia.gov/idc/groups/public/documents/text/idc013123.pdf>

² NATIONAL WILDLIFE FEDERATION, THE NEW ENERGY FUTURE IN INDIAN COUNTRY: CONFRONTING CLIMATE CHANGE, CREATING JOBS, AND CONSERVING NATURE (2010) available at http://www.nwf.org/News-and-Magazines/Media-Center/Reports/Archive/2010/~media/PDFs/Global%20Warming/Reports/03-23-10_NWF_TribalLands_LoRes.ashx

³ Lizana K. Pierce, DOE's Tribal Energy Program (DOE 2010), available at http://apps1.eere.energy.gov/tribalenergy/pdfs/2_doe_tep_overview_lkp.pdf

Given the vast potential for renewable energy development on tribal lands, many tribes are beginning to explore these opportunities. Some of this activity has been stimulated by the Department of Energy's (DOE) tribal energy program, which funded 129 tribal energy projects between 2002 and 2010.⁴ However, the vast majority of such projects on tribal land are in the planning or feasibility stages, with only one commercial deployment as of August 2010.⁵

Unique Advantages of Projects on Tribal Land

Indian reservations, especially in the Plains states and American southwest, contain large tracts of land that are ideal for renewable energy production. Renewable energy developers often face the challenge of contracting with numerous landowners to put together a potential project. Having to deal with multiple landowners can lead to increased transaction costs and "hold-out" problems in obtaining the consent of landowners. By partnering with a single tribal entity, these problems can be avoided.

Tribal lands have regulatory advantages as well. While most renewable energy projects require regulatory approval from state agencies—often a cumbersome process—state and local laws generally do not apply to tribal lands.

Federal law also provides significant technical and financial assistance to support renewable energy development on tribal land. Pursuant to the Energy Policy Act of 2005, the DOE provides (i) technical assistance including support staff, strategic energy planning, energy options analysis or resource planning, energy organization development, and human capacity building; and (ii) financial assistance to tribes including grants, loans, and loan guarantees for planning and development of energy generation and transmission projects.⁶ The DOI also provides support for tribal renewable energy development through technical expertise and loan guarantees.⁷

Rationale for Joint Ventures Between Tribes and Energy Companies

For several reasons, it makes sense for tribes to partner with energy developers rather than going it alone: first, renewable energy projects are capital intensive projects, and many tribes have limited access to capital; second, most tribes do not have technical expertise in renewable energy projects; third, because tribes do not pay income taxes, the (nontransferable) federal tax credits available on renewable energy projects are of no use to tribes acting on their own.

The cost ramifications of not being able to use these tax incentives are significant. For solar projects, private developers receive a Business Energy Investment Tax Credit (ITC) of 30% of the project's cost.⁸ Similarly, wind, geothermal and closed-loop biomass project owners can elect to take the 30% ITC or can receive a Performance Tax Credit (PTC) that affords the project's owner a tax credit of 2.2 cents per kilowatt hour of generation for 10 years of the project.⁹ The American Recovery and Reinvestment Act temporarily gives taxpayers (project owners) the option of electing a cash grant in lieu of the tax credits, but this option is not available to tribal entities because of their tax-exempt status. Renewable energy



⁴ Id.

⁵ Amy Standen, *Tribal Lands Struggle to Bring Clean Power Online*, NPR, <http://www.npr.org/2010/08/20/129303545/tribal-lands-struggle-to-bring-clean-power-online>

⁶ Title XXVI of the Energy Policy Act of 2005, Pub. L. No. 109-58.

⁷ 25 U.S.C. § 3502(a)(1).

⁸ 26 U.S.C. § 48.

⁹ 26 U.S.C. § 45.

assets also receive preferential depreciation schedules that allow owners to deduct the cost of these assets over a five-year period using the 200% double declining balance depreciation method, another benefit that is again available only to entities with taxable income.¹⁰

By partnering with a private company, a tribal entity can structure a renewable energy project to ensure that the tax benefits reduce the substantial project cost. The tribal entity can act as a land-lessor to the project developer and/or contract for ownership of the project after the tax benefits expire. In the latter instance, a tribal developer could initially sell much of the renewable energy project to a private entity purchaser who would benefit from the tax credits and depreciation deductions. During this time, the tribal entity may retain an ownership interest and would receive other economic benefits through management and land-lease fees. The private entity could then “flip” most of its stake in the project back to the tribal developer after a set duration of time, usually when the tax benefits expire.

Need for Leasing Regulations for Tribal Renewable Energy Projects

Whatever the structure of a tribal-energy company joint venture, a lease of tribal land is likely required—and that requires federal approval. As a matter of federal law, any contract that “encumbers” tribal land for a period of seven years or more, as well as any lease of tribal land, must be approved by the Secretary of the Interior.¹¹

BIA’s leasing regulations currently in effect are more than 50 years old¹² and, not surprisingly, they are ill-suited for renewable energy projects. The existing regulations distinguish between agricultural and non-agricultural leases. There are no current regulations specific to wind and solar projects, nor any benchmarks for how the economic benefits under a WSR lease might be shared (merely that a lease must be for “fair annual rental”).¹³ Another problem with the current regulations is the lack of any clear standards, or timeline, for gaining Secretary approval.

The lack of specific regulations for wind and solar resources, combined with uncertainty and delay in the approval process, explains (at least in part) the as-yet-unrealized development of renewable energy on tribal lands—and it provides the context for BIA’s new regulations.

Proposed Regulations for WSR Permits and Leases

The BIA’s proposed regulations seek to provide tribal entities and private partners a streamlined process for obtaining federal approval for leases and permits of wind and solar resources.¹⁴ While project developers would still be required to receive approval for WSR leases, the proposed regulations add clarity and transparency to the process by providing specific requirements for the application. The proposed regulations also mandate that the BIA defer to the tribal landowner’s judgment in most cases for a permit and only allow the BIA to deny WSR leases if there is a “compelling reason.” Furthermore, the BIA must act on the application—by denying it, approving it or requesting further information—within 20 days of receiving a permit application and within 60 days of receiving a lease application. This ensures that tribes and project developers have an established timeline for gaining regulatory approval.

¹⁰ 26 U.S.C. § 168.

¹¹ 25 U.S.C. §§ 81, 415.

¹² 22 FR 10566.

¹³ 25 C.F.R. § 162.604.

¹⁴ *Preliminary Draft of Part 162*, U.S. DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS (proposed February 15, 2011) (to be codified at 25 C.F.R. 162), available at <http://www.bia.gov/idc/groups/public/documents/text/idc013123.pdf>

The BIA's proposal also provides benchmarks for the economic benefits tribes should receive when they contract for WSR permits or leases. For WSR permits, the BIA will propose per-acre fees and minimum fees once every three years to govern most projects; however, the tribe and project developer can accept an alternative fee structure or a nominal payment if the parties demonstrate that the development is in the tribe's best interest. Similarly, WSR leases must include a monetary payment not less than a fair market rental that may be based (i) on a fixed amount, (ii) a percentage of the projected gross income or (iii) a megawatt capacity fee; and the parties can satisfy this requirement by showing that it is in the tribe's best interest to accept less than the fair market value.

By specifically addressing WSR leases—including particular application requirements, benchmarks for fair rental value, a deferential standard for approval, and set timelines for federal action—the proposed regulations should facilitate the leasing of tribal lands for renewable energy development. While there are other issues that must be dealt with in any tribal/non-tribal joint venture (e.g., issues associated with tribal sovereignty, including sovereign immunity, choice of law, forum selection for disputes; ownership, control and authority over the project and project assets; duration and termination), streamlining the federal approvals process is one of the most important and should benefit tribes and their development partners alike.

Conclusion

The BIA's proposed leasing regulations are in the early stages of the regulatory process. In March and April 2011, the BIA is holding consultation sessions to receive input from tribal and energy company representatives. After this consultation period, the final proposed regulations are expected to be published in the Federal Register by late summer of 2011, with a goal of becoming final and effective in 2012.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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